Supreme Court of the United States.

October Term, 1968.

No. 65.

TIMOTHY F. LEARY,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

MOTION OF NATIONAL STUDENT ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE AND BRIEF AMICUS CURIAE.

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MOTION OF NATIONAL STUDENT ASSOCIATION FOR LEAVE TO FILE A BRIEF AMICUS CURIAE.

The National Student Association files this brief in the belief that punishment of petitioner under either the Marihuana Tax Act or *21 U.S.C. § 176a,* would violate petitioner's Fifth Amendment privilege against self-incrimination.

Petitioner has by his attorney granted his permission for the filing of this brief, but the permission of the United States was denied by the Solicitor General.

We believe that, while petitioner and the American Civil Liberties Union as Amicus Curiae have made adequate examinations of the effect of the Fifth Amendment privilege on the Marihuana Tax Act, an exceptionally important line of argument has not been satisfactorily put forth concerning the effect of the Fifth Amendment privilege on 21 U.S.C. § 176a, under which petitioner is also charged! It is our opinion that the standards defined in the cases of *Marchetti* v. *United States,* 390 U.S. 39 (1968); *Grosso* v.

United States, 390 U.S. 62 (1968); and *Haynes* v. *United States,* 390 U.S. 85 (1968), apply to 21 U.S.C. § 176a, but in a radically different way than they apply to the Marihuana Tax Act. The Tax Act is the easier statute to attack, because it was modelled upon the National Firearms Act and the Gambling Tax Act, and presents problems closely analogous to those two acts. 21 U.S.C. § 176a, however, does not in itself create a crime, as does the Marihuana Tax Act, but, through a complicated series of incorporations by reference, merely punishes more stringently conduct already illegal under the Marihuana Tax Act and the general customs provisions of Title 19 of the United States Code. Insofar as the Marihuana Tax Act is the basis of illegality for prosecutions under § 176a, § 176a must suffer the same infirmities under the Fifth Amendment as the Marihuana Tax Act itself. But § 176a also may be read to rest in part upon the general customs provisions of Title 19, which provisions may be saved from debility under the Fifth Amendment by the principles set forth in *Shapiro* v. *United States,* 335 U.S. 1 (1948). We contend that § 176a is still a violation of the privilege against self-incrimination notwithstanding the validity of any part of Title 19, and notwithstanding the fact that Title 19 and not § 176a makes illegal the conduct which § 176a seeks to punish, because § 176a is so narrowed in scope of application as to apply to only a small group with ample fears of self-incrimination, and therefore the principles of *Shapiro* v. *United States,* which might save the general customs provisions from infirmity under the Fifth Amendment, cannot be applied by incorporation to § 176a.

The last argument in our brief deals with the presumption of importation contained in § 176a. We contend that the presumption violates the due-process clause of the Fifth Amendment, even if petitioner has not sustained a burden

of proof in showing that the presumption is unreasonable because a high percentage of marihuana is domestically produced. Special rules must apply to this presumption because it concerns an area where no defendant can be expected to have evidence of the origin of any marihuana in his possession, or the kind of information which would allow the judiciary to make the necessary judgment as regards the reasonableness of the presumption.

Because we believe that the arguments put forth in the accompanying brief are important to a decision of the issues raised in the case at bar,[1] under the writ of certiorari granted therein, we therefore request this Honorable Court to grant us leave to file the accompanying brief *Amicus Curiae.*

JOSEPH S. OTERI,
Attorney for
NATIONAL STUDENT ASSOCIATION.

[1] The attorneys for the American Civil Liberties Union have examined the accompanying brief, and join with us in urging that leave to file Amicus Curiae be granted, and further join with us in requesting that all arguments in the accompanying brief which were not covered in their previously filed Amicus brief be considered supplemental thereto.

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BRIEF OF NATIONAL STUDENT ASSOCIATION, AMICUS CURIAE.

Interest of Amicus.

The National Student Association files this brief in the belief that punishment for acquiring marihuana without having paid the $1,000 per ounce regulatory excise tax under the Marihuana Tax Act, or punishment for possession of marihuana imported "contrary to law" under 21 U.S.C. § 176a, violates the Fifth Amendment privilege against self-incrimination.

The National Student Association represents over 350 student-government associations, representing a total enrollment of over 1.7 million students, from every area of the country. It is the only nation-wide generally representative organization concerned with promoting the interests of students.

The National Student Association has for some time been concerned with the social and academic effects of drug and marihuana use among students. It has a large Drug Studies Program which deals exclusively with this problem, which has been supported by a grant from the National Institute of Mental Health during the past year. The National Student Association as an organization is a member of the Executive Committe of the National Coordinating Council on Drug Abuse, Education and Information, and affiliated with the National Sex and Drug Forum.

The specific interest in the National Student Association in the present case is as follows: The case at bar concerns the operation of certain statutes on consumers of marihuana. The young, and especially students, make up a great percentage of marihuana consumers in the United States today. The National Student Association feels that the incidence of application of these statutes to students and potential students is much higher than it is for the general public, and that this supports the interest of the National Student Association as Amicus in the present cases. The National Student Association could not effectively represent the best interests of its constituency if it were not allowed to file a brief offering what it considers new and cogent argument in a case which affects the interests of a large number of its constituents. The National Student Association feels the present scheme of marihuana control by self-incriminatory devices and unreasonable presumptions is a significant causal factor in the cynicism and disrespect for law of significant groups in its constituency, and of the alienation of young people in general.

Summary of Argument.

This brief argues that the Fifth Amendment privilege against self-incrimination should, under the principles of the decisions in *Marchetti* v. *United States*, 390 U.S. 39, 88 S. Ct. 697 (1968), *Grosso* v. *United States*, 390 U.S. 62, 88 S. Ct. 709 (1968), and *Haynes* v. *United States*, 390 U.S. 85, 88 S. Ct. 722 (1968), act as a defense to any charges brought under any section of the Marihuana Tax Act, because that Act seeks to elicit information from persons inherently suspect of criminal activity in an area permeated by criminal statutes, and provides for the maximum cooperation between federal and other prosecutionary authorities for the apprehension of individuals who attempt to comply with its requirements.

Further, this brief argues that the privilege against self-incrimination should also, by the reasoning in the aforementioned cases, provide marihuana importers with a defense to charges under 21 U.S.C. § 176a, for importing marihuana "contrary to law," because, regardless of whether the *basis of illegality* connoted by the term "contrary to law" arises from violations of the narrowly drawn Marihuana Tax Act or from violations of the more general customs provisions of Title 19 of the U.S. Code (the two possible sources of illegality of importation), 21 U.S.C. § 176a, is a statute of narrow application which seeks to elicit incriminatory information from those inherently suspect of criminal activity in an area permeated by criminal statutes and which seeks either to aid state prosecutions with the incriminatory information provided in compliance with the Act, or to punish importers for non-compliance. Insofar as the marihuana importer has imported the marihuana "contrary to law" by a violation of the Marihuana Tax Act, a prosecution for his failure to incriminate himself in compliance with the Import Act is as constitutionally infirm

as a related prosecution for the same failure to incriminate himself in compliance with the Marihuana Tax Act. Insofar as the importer has violated 21 U.S.C. § 176a because of his violation of the general Customs Act, he should still be afforded the Fifth Amendment defense against prosecutions under 21 U.S.C. § 176a, because, notwithstanding the validity of the generally drawn customs provisions of Title 19, 21 U.S.C. § 176a, is so narrowed in scope of application as to apply only to those with ample fears of self-incrimination. The validity of the general customs provisions rests on the Government's legitimate interest in securing information concerning the whole range of foreign commerce for purposes of control and taxation. 21 U.S.C. § 176a, on the other hand, applies to importers, only to compel self-incrimination on threat of criminal sanction. We contend that Congress may not single out a narrow group of persons and pass legislation which acts specifically to compel self-incrimination from that group. Whatever legitimate interests sustain the general customs provisions cannot by incorporation save 21 U.S.C. § 176a.

The whole thrust of *Marchetti* and its companion cases, *supra,* is to make a distinction between laws which are designed to operate generally and require a general form of disclosure as a necessity of taxation or economic or other general control (where some self-incrimination may be an unfortunate by-product in a limited number of cases) and laws where self-incrimination is the *raison d'être* or major focus of the law itself. 21 U.S.C. § 176a, is definitely in the latter category.

21 U.S.C. § 176a, was enacted in order to impose the same sort of registration requirements on those who import marihuana as had already been imposed on machine-gun owners and gamblers. 21 U.S.C. § 176a, has narrowed the scope of Title 19 and imposed a penalty on those falling into this

narrowed group far in excess of anything imposed on the general violator. Congress intended that special enforcement machinery and procedures be developed to enforce § 176a, and this has in fact been the case. Such differential enforcement and penalty, applied to such a narrow group, is conclusive evidence that this narrowing was intended by Congress to provide severe punishment of persons with ample fears of self-incrimination for their refusal to incriminate themselves under state law. In other words, 21 U.S.C. § 176a, operates precisely, as does the Marihuana Tax Act, as a statute narrowly drawn so as to force incrimination; and it is not rendered less odious by virtue of its incorporation of the general customs provisions which are sustainable precisely because of their broad application in an area of general, primarily legitimate, foreign commerce.

The brief further contends that, if the Marihuana Import Act is merely restricted in application to that group who are not actually being prosecuted for refusal to incriminate themselves; that is, those who did not themselves import the marihuana upon which the prosecution is based, and a Fifth Amendment defense is given to those who have actually refused to incriminate themselves, that is, importers, then those who have a legitimate claim to a Fifth Amendment defense will be placed on the horns of an intolerable dilemma, for they must choose between allowing their prosecution for failure to incriminate themselves to go forward, or incriminating themselves under state law by admitting their importership in order to establish their Fifth Amendment defense. Therefore we argue that no convictions should be allowed under § 176a consonant with the Fifth Amendment.

The brief further argues that, even if the Court might otherwise sustain the statute and offer a defense only to

those with actual standing to invoke the privilege (actual importers of marihuana), this would not be inadvisable in the present case, because the statute was directed primarily at actual importers, and there is serious doubt that Congress would have enacted § 176a had it known that its scope would become so constricted that only non-importers of marihuana could be convicted under it, while actual importers escaped scot-free.

Finally, with respect to the presumption of importership contained in 21 U.S.C. § 176a, the brief argues that, while the standard of a "rational connection" between the fact proved and the fact presumed may be appropriate when applied to most presumptions wherein defendants can reasonably be expected to have means of rebuttal if innocent, a much more stringent standard of connection than mere "rational connection"—one approaching the certainty of proof beyond a reasonable doubt which the presumption replaces—is necessary when the presumption affects, as does the presumption in § 176a, a large group of innocent defendants who cannot reasonably be expected to be able to rebut the presumption. Unless a more stringent standard than mere "rational connection" is used, the presumption violates notions of fundamental fairness by convicting large numbers of innocent along with the guilty.

Argument.

I. Preliminary Analyses Necessary to a Full Discussion of the Case at Bar.

A. The Relevant Cases.

In the cases of *Marchetti* v. *United States*, 390 U.S. 39, 88 S. Ct. 697 (1968), *Grosso* v. *United States*, 390 U.S. 62, 88 S. Ct. 709 (1968), and *Haynes* v. *United States*, 390 U.S. 85,

88 S. Ct. 722 (1968), the Supreme Court has made more clear the scope of the protections against self-incrimination under the Fifth Amendment as applied to federal registration tax and disclosure laws in the areas permeated by other federal and state criminal sanctions. The protections afforded by these three cases taken together are directly relevant to the case at bar.

Since the relevant issues here, as in the *Marchetti* case and the two companion cases, are registration, taxation and the Fifth Amendment privilege against self-incrimination, the case before the Court is not one of first impression in the true sense of that phrase. It makes little difference that the substantive crime here involves drugs instead of machine guns or gambling.

In *Marchetti*, petitioner was convicted (1) of conspiracy to evade payment of the annual occupational tax imposed on gambling, under 26 U.S.C. § 4411, and (2) of willful failure to pay the occupational tax and willful failure to register, as required by 26 U.S.C. § 4412. The Court noted that the gambling tax and registration provisions "are part of an interrelated statutory system for taxing wagers" (390 U.S. 39, 42, 88 S. Ct. 699), by which gamblers are required to pay an occupational tax and a 10% excise tax on gross wagers, to submit Internal Revenue forms bearing, *inter alia*, the gambler's name as well as his residence and business address, to register, and to keep daily records open for federal inspection. Moreover, the Court noted that the Internal Revenue Service is "instructed . . . to provide certified copies of the listing [of registrants and the information required by the federal statutes] to any state or local prosecuting officer," pursuant to 26 U.S.C. §§ 4403 and 4423. 390 U.S. 39, 43, 88 S. Ct. 700. Finally, the Court found that "wagering and its ancillary activities are very widely prohibited" with criminal sanctions "under both

federal and state law" (390 U.S. 39, 44, 88 S. Ct. 700), and that "information obtained as a consequence of the federal wagering tax laws is readily available to assist the efforts of state and federal authorities to enforce these penalties." 390 U.S. 39, 47, 88 S. Ct. 702.

In holding convictions under the federal wagering statutes unconstitutional as violative of the Fifth Amendment privilege against self-incrimination, the Court asserted:

> (1) "In these circumstances [those described *supra*], it can scarcely be denied that the obligations to register and to pay the occupational tax created for petitioner 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination." 390 U.S. 39, 48, 88 S. Ct. 702.
>
> (2) (Overruling *Lewis* v. *United States*, 348 U.S. 419 (1955).) "The question is not whether petitioner has a 'right' to violate state law, but whether, having done so, he may be compelled to give evidence against himself. . . . We cannot agree that the constitutional privilege is meaningfully waived merely because those 'inherently suspect of criminal activities' have been commanded either to cease wagering or to provide information incriminating to themselves, and have ultimately elected to do neither." 390 U.S. 39, 51-52, 88 S. Ct. 704.
>
> (3) (Overruling *Lewis* and *United States* v. *Kahringer*, 345 U.S. 22 (1953).) "The hazards of incrimination created by §§ 4411 and 4412 as to future acts are not trifling or imaginary. Prospective registrants can reasonably expect that registration and payment of the occupational tax will significantly enhance the likelihood of their prosecution for future acts . . . Indeed, they can reasonably fear that registration, and acquisition of a wagering tax stamp, may serve as decisive

evidence that they have in fact subsequently violated state gambling prohibitions." 390 U.S. 39, 54, 88 S. Ct. 706.

(4) (In refusing to save the federal statutes by applying use-restrictions.) "The terms of the wagering tax system make it quite plain that Congress intended information obtained as a consequence of registration and payment of the occupational tax to be provided to interested prosecuting authorities.... We must therefore assume that the imposition of use-restrictions would directly preclude effectuation of a significant element of Congress' purposes in adopting the wagering taxes. Moreover, the imposition of such restrictions would necessarily oblige state prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes . . ." 390 U.S. 39, 58-59, 88 S. Ct. 708.

Finally, *Shapiro* v. *United States*, 335 U.S. 1, was distinguished because (1) the records required to be kept there, concerning the wholesale of fruit, were "of the same kind as he has customarily kept," (2) the records were of such a character as to have "public aspects" "analogous to public documents" and "that petitioner, as their custodian, could not assert the privilege as to them," and (3) the requirements at issue in *Shapiro* were imposed in "an essentially non-criminal and regulatory area of inquiry" while those here are directed to a selective group inherently suspect of criminal activities. *Grosso* v. *United States*, 390 U.S. 62, 88 S. Ct. 707, citing *Albertson* v. *Subversive Activities Control Board*, 382 U.S. 70, 79.

The elimination of the dichotomy between prospective and retrospective incrimination is important in the present

case. Clearly, all laws which seek to extract information from a person about his past criminal deeds are unconstitutional. However, certain laws do not operate to isolate information about past criminal acts, but seek to gain information which will segregate an individual from the aggregate mass of individuals as one who is likely to commit a crime. Since these types of laws, such as the Gambling Tax Act and the National Firearms Act, do not force the individual to divulge any specific information about past crimes, or even depend upon his having committed any past crimes, the Government has always argued that the operation of the statute was prospective, and that therefore the statute was not unconstitutional. In rejecting this dichotomy, the Court has made the test, not a test of retrospectivity, but a test of increased likelihood of future prosecution. Thus, as in *Albertson*, the information required need not be criminal *per se* in all cases, but simply correlate highly with criminal activity, which is another way of saying that the information required pertains to "an area permeated with criminal statutes." If the statute is designed to separate those individuals who are likely to be involved in criminal activity from the mass of humanity by requiring some registraton or declaration, then it is a violation of the Fifth Amendment, whether one conceptualizes the incrimination as retrospective or prospective or both.

Also, it is significant for our purposes to note that with regard to information not usually kept, and in an "area permeated with criminal statutes":

> "The Government's anxiety to obtain information known to a private individual does not without more render that information public; if it did, no room would remain for the application of the constitutional privilege. Nor does it stamp information with a public character that the Government has formalized its de-

mands in the attire of a statute . . .'' 390 U.S. 39, 57, 88 S. Ct. 707.

In *Grosso*, petitioner was convicted for willful failure to pay the excise tax imposed by 26 U.S.C. § 4401, willful failure to pay the special occupational tax pursuant to 26 U.S.C. § 4411, and conspiracy to defraud the United States by evasion of both taxes under 18 U.S.C. § 371. In addition to the divulgence of information required in *Marchetti*, petitioner was required, by Treasury Regulations § 44.6011(a)-1(a), to submit monthly I.R.S. forms containing ''evidence in the most direct fashion . . . of the taxpayer's wagering activities.'' 390 U.S. 62, 63-65, 88 S. Ct. 712.

Moreover, noting Pennsylvania's ''comprehensive statutory system for the punishment of gambling and ancillary activities'' (390 U.S. 62, 64, 88 S. Ct. 711), the Court found that petitioner here, as in *Marchetti*, was involved in an area '' 'permeated with criminal statutes,' where he is 'inherently suspect of criminal activities' '' (390 U.S. 62, 64, 88 S. Ct. 712), and that therefore the hazards of self-incrimination ''can only be characterized as real and appreciable.'' 390 U.S. 62, 66-67, 88 S. Ct. 713.

The Court in *Grosso* relied heavily upon the reasoning in *Marchetti* to rule that the conviction of persons in petitioner's position under these federal statutes was unconstitutional. However, it did present one additional element to the principles set forth in *Marchetti*:

> ''[A]lthough there is no statutory instruction, as there is for the occupational tax, that state and local prosecuting officers be provided listings of those who have paid the excise tax, neither has Congress imposed explicit restrictions upon the use of information obtained as a consequence of payment of the tax. More-

> over, it appears that the Revenue Service, evidently acting under the authority of certain general statutory provisions, has undertaken to tender this information to interested prosecuting authorities. We can only conclude that those liable for payment of the excise tax reasonably may expect that information obtainable from its payment, or from submission of Form 730, will ultimately be proffered to state and federal prosecuting authorities." 390 U.S. 62, 66, 88 S. Ct. 712.

Thus, even absent express statutory provision for federal divulgence, the established federal practice to make such information available to state and federal prosecutors, consonant with the general statutory scheme to enhance convictions, was sufficient to present real and appreciable fear of self-incrimination. Moreover, relying upon the function of the I.R.S. form within the entire federal system of wagering statutes, the Court concluded:

> "[I]t would be inappropriate to impose . . . [use]-restrictions upon one portion of a statutory system, when we have concluded that it would be improper, for reasons discussed in *Marchetti*, to do so upon 'an integral part' of the same system." 390 U.S. 62, 69, 88 S. Ct. 714.

Finally in *Haynes* v. *United States*, petitioner was convicted under 26 U.S.C. § 5851, for knowingly possessing a firearm, defined in 26 U.S.C. § 5848, which had not been registered with the Secretary of the Treasury or his delegate, as required by 26 U.S.C. § 5841. Again the Court was presented with a comprehensive system of imposed taxes and a network of registration and declaration requirements calculated to insure their collection.

And again the Court barred convictions, on Fifth Amendment grounds, under the contested federal statutes. The *Haynes* decision adds several crucial elements to the principles already set forth in *Marchetti* and *Grosso;* and, in order to establish their relevance to the case at bar, it is necessary to reproduce the reasoning in *Haynes* in some detail.

26 U.S.C. § 5851, under which petitioner was convicted, established three distinct requirements:

> "It shall be unlawful for any person to *receive or possess*
> [1] any firearm which has *at any time* been transferred in violation of sections 5811, 5812 (b), 5813, 5814, 5844, or 5846, or
> [2] which has *at any time* been made in violation of section 5821, or
> [3] to *possess* any firearm which has not been registered as required by section 5841."
> [Numbering added for convenience of this argument.]
> [Emphasis supplied.]

As already stated above, Haynes was convicted under the third clause of the section. Relying upon the absence of the phrase "at any time" in the third clause, upon the fact that the third clause proscribes only *possession* (rather than receipt and possession as in clauses [1] and [2]), and upon legislative history, the Court decided that clause [3] does not punish a transferee for a transferor's failure to register (as the Government initially contended), but rather for the transferee's possession of a firearm which he *himself* did not register.

Laboring under this construction of § 5851, the Government then stressed that, while convictions under § 5841, with its express requirement of registration, would fall

under what are now the principles of *Marchetti* and *Grosso*, nevertheless the Government could prosecute under § 5851 [3], which does not expressly require registration but which proscribes *possession* and thereby merely "creates a 'status of unlawful possession' which, if assumed by an individual, denies him the protection of the constitutional privilege." 390 U.S. 85, 95, 88 S. Ct. 729. In other words, the Government urged that, while the failure to register under § 5841 could not be used to prosecute those invoking the Fifth Amendment privilege, nevertheless the Government could, without violating Fifth Amendment principles, convict those who assumed the status of possession of firearms which they should have registered.

The Supreme Court, however, rejected the Government's distinction because, regardless of the fact that § 5851 [3] literally proscribes only possession and § 5841 proscribes failure to register, nevertheless "possession of a firearm and a failure to register are equally fundamental ingredients of both offenses." 390 U.S. 85, 95, 88 S. Ct. 729.

To bolster its argument, the Government then asserted that there were no Fifth Amendment problems, because, in assuming the illegal status of possession, petitioner had waived his Fifth Amendment privilege. However, when the crimes are in fact co-terminal, the Court was as hostile to such fictitious notions of waiver in *Haynes* as it was in *Marchetti*—

> "for reasons discussed in *Marchetti* v. *United States*, decided today . . . we decline to hold that the performance of an unlawful act, even if there exists a statutory condition that its commission constitutes a waiver of the constitutional privilege, suffices to deprive an accused of the privilege's protection. We hold that petioner's conviction under the registration clause of § 5851 is not properly distinguishable from a conviction

under § 5841 for failure to register, and that both offenses must be deemed subject to any constitutional deficiencies under the Fifth Amendment from the obligation to register." 390 U.S. 85, 95, 88 S. Ct. 729.

Haynes is crucial in that it extends the *Marchetti-Grosso* principles in one significant respect: *Marchetti* and *Grosso* rendered conviction void under statutes where failure to register was the express basis of prosecution. In contrast, in the *Haynes* case, § 5851 did not deal expressly with registration requirements. Nevertheless, once having chosen to possess the firearm, an individual could have escaped illegality under § 5851 only by registering. And, since registration was the only means to escape being in the illegal status of possession, then "possession . . . *and a failure to register are equally fundamental ingredients*" (390 U.S. 85, 95, 88 S. Ct. 729) (emphasis supplied), even though registration is not expressly required. In other words, if, having chosen to possess, registration is the only means of escaping illegality, then the requirement of registration will be deemed an essential element of the statute even though it is not *expressly* required. Therefore, if pursuant to *Marchetti* and *Grosso* an individual cannot be convicted for failure to register goods, then likewise he cannot be convicted under a related statute for possession of those same unregistered goods.[1]

[1] Though not crucial to the case at bar, it remains to be said, only to complete the reasoning in *Haynes*, that, since the registration necessary under § 5841 to remove illegal status under § 5851 [3] applied only to those who had not complied under § 5851 [1] or [2], such registration subjected the registrant to immediate prosecution under [1] and [2], and therefore conviction for failure to register under [3] could not be constitutionally upheld. Thus it is significant to note that the danger of incrimination here is not the result of related state statutes, as in *Marchetti* and *Grosso*, but wholly the result of federal legislation.

The relevance of the *Marchetti*, *Grosso* and *Haynes* decisions to the case at bar is manifest. 21 U.S.C. § 176a, and the Marihuana Tax Act under which petitioner has been indicted, are both part of an "interrelated statutory system" designed to "provide more effective means for the eradication of the illicit trafficking in these drugs and for the elimination of the illegal use of these drugs." Conference Report No. 2546, Narcotic Control Act of 1956, U.S. Code Cong. and Admin. News, 84th Cong. 2d Sess. (1956), 3274. As we shall show, compliance with these statutes would subject a defendant to "real and appreciable" fear of self-incrimination in an area "permeated with criminal statutes."

B. The Relevant Statutes.

Before discussing specifically the case at bar, it is necessary to show how the statutes under which petitioner was indicted function within the federal statutory scheme.

21 U.S.C. § 176a provides:

> "Notwithstanding any other provision of law,
> [1] whoever, knowingly, with intent to defraud the United States, imports or brings into the United States marihuana contrary to law, or
> [2] smuggles or clandestinely introduces into the United States marihuana which should have been invoiced, or
> [3] receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or
> [4] whoever conspires to do any of the foregoing acts, shall be imprisoned not less than five or more than twenty years . . . [presumption]. Whenever on

trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

[The clauses have been labelled for the purposes of the following discussion.]

B1. Incorporation of the Basis of Illegality from Other Statutes.

It is crucial to note at the outset that none of the numbered clauses, taken by itself, defines completely the basis of illegality upon which an individual is to be punished. Rather, each clause incorporates by reference and depends upon tests of legality or illegality set out in other statutes or clauses. To demonstrate this fact, it is necessary to examine each of the clauses.

Under § 176a[2], while smuggling or clandestinely introducing marihuana which should have been invoiced is proscribed, there is nothing in § 176a which sets out which marihuana "should have been invoiced." Rather, one must resort to various provisions of the General Customs Act (Title 19 of the U.S. Code), such as 19 U.S.C. §§ 1496 and 1497, requiring the declaration of any article brought into the country and prescribing penalties of forfeiture and fine equal to the value of the article upon failure to declare. *Thomas* v. *United States,* 314 F. 2d 936 (5th Cir. 1963).

Similarly, the proscription under § 176a[1] concerning importing or bringing into the United States marihuana "contrary to law" does not establish what is meant by "contrary to law." Instead, the test for a violation under § 176a[1] depends upon whether the activities in question

are "contrary to law" pursuant to other federal statutory provisions, which § 176a[1] by reference incorporates. These incorporated provisions stem from either the Marihuana Tax Act or the General Customs Act, and involve:

(1) failure of an importer to comply with 26 U.S.C. § 4755, which provides:

> "It shall be unlawful for any person required to register and pay the special tax under the provisions of sections 4751 to 4753, inclusive, to *import*, manufacture, produce, compound, sell, deal in, dispense, distribute, prescribe, administer, or give away marihuana without having so registered and paid such tax." (Emphasis supplied.)

(2) failure of an importer to comply with any of the numerous customs disclosure requirements of the General Customs Act, including the same invoicing requirements upon which § 176a[2], discussed *supra*, is based.

Expressed in other terms, the phrase "contrary to law" in 176a[1] refers to a test or basis of illegality. And it cannot refer to the Smuggling Act or to § 176a[2], because neither statute contains such a test. Instead, the phrase "contrary to law" in § 176a[1] refers to *failure* to comply with the statutory requirements for *lawful* importation which appear only in the Marihuana Tax Act (the tax requirements) and the Customs Act (including, among other disclosure requirements, the invoicing requirements).

Finally, § 176a[3] proscribes receiving, concealing, buying, etc., only that marihuana which was, to the knowledge of the defendant, imported contrary to law. Thus, while § 176a[3] sets forth some elements of a violation thereof, recourse again must be taken to what is "contrary to law" under the Tax Act or the Customs Act.

B2. Constitutionality of Incorporated Marihuana Tax-Act Requirements.

It is clear that an individual may be convicted under § 176a[1] for failure to comply with the Marihuana Tax Act only if he can constitutionally be required to comply with that Act. Similarly, we contend, if an individual who has violated the Tax Act cannot be convicted thereunder consistently with the Fifth Amendment, he cannot be convicted under § 176a[1] for the same failure to comply merely because the requirements were incorporated into the second statute. Otherwise, Congress could circumvent the privilege against self-incrimination merely by enacting an incorporating statute to bolster any statute rendered unenforceable by the privilege.

We intend to show that the Marihuana Tax Act concerns an area permeated with criminal statutes, is aimed at individuals inherently suspect of criminal activities, is supplemented by express authorization for disclosure of information given in compliance therewith to state and federal prosecuting authorities, and was obviously designed to implement the practice of disclosure and cooperation among all authorities, state and federal, to facilitate both state and federal prosecution. Under such circumstances, we contend, individuals are subject to a real and appreciable fear of self-incrimination and may not be compelled to comply with the Tax Act provisions, and may not be convicted for failing to do so, consistently with *Marchetti*. Finally, as stated above, we shall argue that § 176a[1], insofar as it incorporates § 4755 of the Tax Act, cannot be used to avoid whatever Fifth Amendment violations would occur in the enforcement of the Tax Act.

B3. The Unconstitutional Use of Customs Requirements under 21 U.S.C. § 176a.

It should also be noted that, while §176a incorporates bases of illegality from two different statutes, the relationship between § 176a and the incorporated tax requirements, on one hand, and the relationship between § 176a and the incorporated customs requirements, on the other, is rather different.

Both § 176a and the Tax Act explicitly concern marihuana. They apply to the same classes of persons inherently suspect of criminal activity (*i.e.*, those dealing with marihuana) with the same specificity. They are directed toward the same category of activity permeated with criminal statutes and impose roughly comparable penalties. Finally, the legislative history shows, as we shall demonstrate, that the Import Act was enacted to serve along with the Tax Act as an interrelated regulatory system, along with state legislation, to control the trafficking in marihuana.

In sharp distinction, the Title 19 customs provisions are general in scope, governing the importation of all goods, most of which are not the subject of heavy criminal penalties. The Customs Act serves as a general border control provision to regulate vast amounts of legitimate commerce. The penalties imposed for failure to invoice are mere forfeiture and an *ad valorem* fine. While incorporating the customs requirements as one basis of illegality, the Marihuana Import Act is designed to focus upon one importing activity concerning an area permeated by criminal statutes and one class of individuals inherently suspect of criminal activities. Moreover, the information requirements associated with the Marihuana Import Act go far beyond an intent to insure collection of taxes, and were actually intended, as we shall show, to facilitate state and federal

criminal prosecution. In short, while incorporating by reference some general customs provisions, § 176a nevertheless functions in its application to importers of marihuana as the same type of specifically engineered statute as the Marihuana Tax Act. And we shall show that whatever Fifth Amendment problems arise from the prosecution of the failure to invoice marihuana, as distinguished from the failure to register a general class of unspecified goods, cannot be evaded by requiring the invoicing of all goods in one Act and then singling out the area permeated by criminal statutes in another Act and attaching more stringent penalties to it.

B4. Classes of Violators under § 176a.

Bearing this rather complicated system of incorporation in mind, we can now establish three distinct classes of violators who may be indicted under § 176a, each suffering related, but not identical, infringements of the Fifth Amendment privilege as set forth in *Marchetti, Grosso* and *Haynes.*

First, an individual who has failed to comply with the tax and registration requirements of the Tax Act may be indicted under § 176a[1]. For the purpose of verbal economy, persons indicted under such circumstances will be called "tax violators." Second, an individual who has failed to comply with the various customs disclosure requirements might be indicted either under § 176a[1] or (if his customs violation concerns failure to invoice, as is most likely the case) under both § 176a[1] and [2]. Such individuals shall be called "customs violators."

Finally, § 176a[3] may be violated if an individual receives, conceals, buys, facilitates transportation of, etc., marihuana which to his knowledge was imported contrary to law. It is relevant to divide this third class into two

subclasses of people. There are those who receive, transport, etc., who are themselves *not* the importers, but who, by merely *possessing* the marihuana, are presumed to have knowledge of its importation contrary to law. Second, clause [3] of § 176a also extends to actual importers who are themselves tax or customs violators, since it is readily apparent that they know they possess illegally imported marihuana, because they themselves imported it illegally. We shall call these two subclasses of violators of § 176a[3] *non-importers,* who possess marihuana known—or presumably known—by them to have been imported contrary to law; and *importers,* whose failure to take steps to legalize their importation makes their status of possession illegal under [3].

B5. Summary.

With these classes of violators in mind, we intend to show that convictions under 21 U.S.C. § 176a, cannot be constitutionally upheld consistently with the principles set forth in *Marchetti, Grosso* and *Haynes.*

We intend to show—

(1) that, under *Marchetti,* an individual invoking the Fifth Amendment cannot be convicted under the Marihuana Tax Act, and therefore cannot be convicted as a "tax violator" under § 176a;

(2) that, while an individual might, consistent with *Marchetti, Grosso* and *Haynes,* suffer fine and forfeiture for violating the general customs provisions, he may not be convicted, consistent with *Marchetti* and *Grosso,* as a customs violator under § 176a, because, while relying in part upon such general customs provisions, § 176a is so narrowed in its scope of application (*i.e.,* to only marihuana importers) as to pertain only to individuals inherently suspect

of criminal activity in an area permeated by criminal statutes;

(3) that importers may not be constitutionally convicted under § 176a[3] consistently with the principles set forth in *Haynes,* because the essential element in the illegality of their activity under § 176a[3] was their own failure to incriminate themselves under either the Tax Act or the customs disclosure requirements, as improperly narrowed in scope by § 176a;

(4) that no one, whether an importer or a non-importer, may be convicted under § 176a[3], because an individual indicted thereunder cannot be forced to show that he falls within the importer class protected by *Haynes,* without being forced to incriminate himself in open court, contrary to the Fifth Amendment (see *Jones* v. *United States,* 362 U.S. 257);

(5) and, finally, that, even if importers might otherwise merely be accorded a Fifth Amendment defense to charges under § 176a, the portion of § 176a yet viable is too meager a representation of original congressional intent to be salvageable by judicial surgery.

C. Legislative History and Operation of State and Federal Marihuana Laws.

It has already been shown, *supra,* that the importer or bringer of marihuana into the United States, in order to be assured that the marihuana he is importing is not being imported "contrary to law," would have to disclose the marihuana under Title 19, thereby declaring to federal and state officials alike that he is now a possessor of marihuana; and he would have to pay the special tax imposed by the Marihuana Tax Act, 26 U.S.C. § 4751, 4755, thereby putting his name on a list which would quickly and without undue

red tape or expense find its way into the hands of state and municipal narcotic and marihuana law-enforcement agencies.

And, even if the importer succeeds in invoicing his marihuana and paying the tax, while this might satisfy all his requirements and obligations to comply with federal law, it would not absolve him from violation of state laws. In fact, such compliance with federal law would facilitate his prosecution under state law. He would unarguably have reasonable fear of real and appreciable hazard of prosecution growing out of and supported by his compliance with the taxing or invoicing requirements or both.

Yet the overall marihuana legislative scheme is even more comprehensive than our discussion thus far would indicate. Even total compliance with the requirements of the Marihuana Import and Export Act, as well as the Marihuana Tax Act, would still subject the importer to danger of incrimination under additional *federal* statutes. Among the crimes that might be revealed or strongly suggested by disclosure of marihuana at the border are present and past conspiracy to smuggle this or other marihuana into the United States (18 U.S.C. § 371), prior illegal sales and transfers of this or other marihuana (*e.g.*, 21 U.S.C. § 176a), or illegally attempting to reenter the United States without having registered as a convicted narcotics offender (18 U.S.C. § 1407). These offenses, as well as prior illegal exportation (21 U.S.C. § 182), could involve the identical marihuana declared, since it is quite possible for one to obtain marihuana in the United States, carry it across the border, and later reenter with it still in one's possession, as alleged in the case at bar.

This whole array of interlocking and intermingling state and federal statutes did not grow up by accident and without design. The legislative histories of the various state

and federal statutes regarding marihuana give impressive support to the textual statutory indications that complete cooperation was envisaged among all agencies concerned with enforcement of marihuana laws, state and federal.

There is a remarkable similarity between the Marihuana Import Act-Marihuana Tax Act legislation and the National Firearms Act. This is assuredly no accident or happy coincidence, as one can understand from the words of Clinton M. Hester, Assistant General Counsel for the Department of the Treasury, at the time that the Bureau of Narcotics was attempting to get the Marihuana Tax Act adopted by the Congress. As he told the House Committee:

> "The purpose of H.R. 6385 is to employ the Federal taxing power not only to raise revenue from the marihuana traffic, but also to discourage the current and widespread undesirable use of marihuana by smokers and drug addicts and thus drive the traffic into channels where the plant will be put to valuable industrial, medical, and scientific uses. In accomplishing this general purpose two objectives should dictate the form of the proposed legislation: first, the development of a scheme of taxation which would raise revenue and which would also render virtually impossible the acquisition of marihuana by persons who would put it to illicit uses . . .; and, second, the development of an adequate means of publicizing dealings in marihuana in order that the traffic may be effectively taxed and controlled.
>
> "The Harrison Narcotics Act . . . was designed to accomplish these same objectives with reference to opium and coca leaves. . . .
>
> "The same objectives impelled Congress to enact the National Firearms Act. . . . [After reviewing the

provisions of the Firearms Act, Hester continued] . . . Thus, provision was made for publicizing dealings in firearms and for restricting their use to those persons who would have legitimate use for them. . .

"The proposed marihuana bill is something of a synthesis of both of these statutes. . . . The filing of information returns is also required in order to publicize the dealings in the plant." Taxation of Marihuana, Hearings, id. at 7.

Thus Hester emphasized the role of this kind of legislation in bringing illicit activity into the open. He clearly envisioned very few legitimate uses for marihuana, and, while he uses the term "valuable industrial, medical, and scientific uses" of marihuana, the hearings make it clear that the only legitimate uses contemplated are the industrial roles of hemp rope, sterilized hemp birdseed, and hempseed oil and varnish.

As recently as 1956 the report of a House Subcommittee reported that there was an international agreement that marihuana was no longer used in medical practice. Control of Narcotics, Barbiturates and Amphetamines, Hearings before the Subcommittee of the Ways and Means Committee of the House of Representatives, 84th Cong. (1955-1956), 1488-1489.

There is, then, no doubt that the Marihuana Tax Act was passed, as was the National Firearms Act, in order to force dealers in illegal marihuana (or illegal firearms, as the case may be) to reveal themselves and their illegal deeds for purposes of state prosecution.

Next, one must ask why the Marihuana Import and Export Act was passed. The answer lies, partially, in an unusually frank interchange between Senator Price Daniel, then Chairman of the Subcommittee on Improvement in

the Federal Criminal Code, Committee on the Judiciary, United States Senate, and two witnesses before the Subcommittee, Chester A. Emerick, Deputy Commissioner, Bureau of Customs, and Ralph Kelly, Commissioner of the Bureau of Customs. The hearing at which the exchange took place was convened for the purpose of considering passage of § 1404 of S. 3760, 84th Cong., 2d Session, which became incorporated into federal law as 21 U.S.C. § 176a.

The subject of the interchange was the degree of cooperation between federal and state narcotic law-enforcement officials. More specifically, the subject concerned the role of the Bureau of Customs in aiding state marihuana law enforcement. Time and again, Messrs. Emerick and Kelly illustrated, much to Senator Daniel's delight, how customs officials make a practice of turning over to state narcotics authorities people whose names are collected by customs officials because said people are suspected narcotics users who make frequent border crossings. Senator Daniel ventured a guess that the enactment of the new law would facilitate and make more clear the duty of the customs enforcers to turn suspects directly over to state police, especially in states where there exist narcotics laws which are extremely harsh. Mr. Kelly informed the Subcommittee that "we are working much more effectively with the local State enforcement people on narcotics than we have before." Narcotic Control Act of 1956, Hearings, Subcommittee on Improvements in the Federal Criminal Code, Committee on the Judiciary, 84th Cong., 2d Session, on S. 3760, May 4, 1956, 22.

Yet clearly the Subcommittee felt that more attention had to be paid to the marihuana traffic. When Mr. Kelly informed Sen. Daniel that a "suspect list" was kept at certain border crossings, but that this list contained "suspects for all classes of violations of customs laws . . . [although] [u]ndoubtedly there is a large number of addicts

in those records," Sen. Daniel made it clear that it was the *marihuana* traffickers in which the Subcommittee was interested, since "it may cut down a lot of those border crossings, if they know that those records are being kept." Id. at 23. Continued the Senator:

> "I know of nothing that would help our law-enforcement officers more than that—to stop some of this overland traffic better than for those records to be there and *available to law-enforcement officers* [sic]." (Emphasis supplied.) Id. at 24.

Mr. Emerick expressed some skepticism that a narcotics addict would register at the border, since such registration would subject him to state prosecution, inasmuch as "[h]e knows if he registers with a Federal officer as an addict that the information will immediately be turned over to the State." This did not bother Senator Daniels, who made it clear that, while the Subcommittee was delighted with the efforts of Customs officials at border crossings to keep card-index files and lists of suspected narcotics violators, nevertheless the Subcommittee wished to make this record-keeping duty more specific. One might conclude that the somewhat haphazard record-keeping and inspection routines of the Customs officials were not considered sufficient by the Subcommittee to control the specific marihuana traffic.

> "Senator Daniel. We had the same thing up on the gambling tax statute and that argument was made [*i.e.*, that nobody would register, since it would be an admission of a state law violation], but I see a lot of them are still paying the tax and admitting they are violating the State law. Has the gambling tax statute finally been upheld?

"C. Aubrey Gasque (General Counsel for the Subcommittee). Yes, sir.

"Senator Daniel. It has been upheld as a constitutional enactment?

"Mr. Gasque. Yes, sir.

"Senator Daniel. There you have the same consideration. And we took that into consideration in drafting this legislation. I say that is all to the good.[2] If they or if we can have some system of requiring these people to at least give you the information that you have been getting on your own initiative at Laredo. That is what we would like to do—you are doing that on your own initiative. You have no special authority from the Congress to do it. We would try to write into this bill something that will give you authority and direct you to do it at the other places where you are not keeping those records because we felt that something should be done about this matter. It was the greatest surprise to me in our local hearings to find that these known addicts were free to go and come and that no records were being made at most of our border stations. . . . I believe we are in agreement this far, that is that it would be a good thing for you to keep a record of narcotic addicts and known narcotic violators at your border stations." Id. at 27.

Thus Senator Daniel clearly felt that there was some question as to whether the Customs laws then existing (Title 19) were sufficient to empower the Bureau of Customs to keep special records of marihuana smugglers, and that, even if the laws did so empower the Bureau of Customs, a new law, specifically aimed at marihuana, was needed in

[2] "Count no man happy until he is dead." Herodotus, quoting Solon.

order to force the Bureau to make the keeping of such marihuana records and the distribution of information to state police a uniform practice rather than a haphazard, occasional practice at selected border crossings.

In *Marchetti* v. *United States, supra,* the Court noted that, while a gambler could easily comply with all federal gambling requirements by paying his occupational and excise taxes, nevertheless "state and local enactments are more comprehensive." The Court noted that the "laws of every state, except Nevada, include broad prohibitions against gambling, wagering, and associated activities." *Marchetti* v. *United States,* 390 U.S. 39, 44. The Court further noted that not even the minor exceptions to the state gambling laws were sufficient to change the fact that "wagering is 'an area permeated with criminal statutes,' and those engaged in wagering are a group 'inherently suspect of criminal activities.'" *Marchetti* v. *United States,* 390 U.S. 39, 47, 88 S. Ct. 707; quoting *Albertson* v. *Subversive Activities Control Board,* 382 U.S. 70, 79.

No state treats marihuana as leniently as Nevada treats gambling and certainly Texas does not. No theoretical exceptions and exemptions in the drug laws of Texas or any other state create of drugs laws an any more meaningful argument against defendant's claim of self-incrimination than was the claim that exemptions and exceptions to the various state gambling laws meant that it was not certain that a registrant or taxpayer under federal law was necessarily incriminating himself under state law. It is sufficient that the area is interlaced with criminality.

From the above discussion it should be apparent that the Marihuana Tax Act and 21 U.S.C. § 176a, were intended as sister statutes in a comprehensive, interrelated federal system designed to effectuate a national policing policy, relying upon prosecutions brought about by feder-

ally coerced disclosure requirements and cooperation between state and federal authorities.

II. Conviction of Violators of the Marihuana Tax Act, and therefore Convictions of Tax Violators under § 176a, Cannot be Constitutionally Upheld Consistently with the Principles of Marchetti.

As we have established *supra*, one basis for prosecuting under § 176a is for an importer's failure to comply with the tax and registration requirements set forth in 26 U.S.C. § 4755(a)(1), which provides:

> "It shall be unlawful for any person required to register and pay the special tax under the provisions of sections 4751 to 4753, inclusive, to *import*, manufacture, produce, compound, sell, deal in, dispense, distribute, prescribe, administer, or give away marihuana without having so registered and paid such tax." (Emphasis supplied.)

Failure to register and pay the tax provides the basis of illegality to prosecute "tax violators," not only under the Marihuana Tax Act, but under § 176a as well.

We maintain, however, that individuals may not be required to comply with the tax and registration requirements of §§ 4751 and 4753 and may not be convicted for failure to do so under the Marihuana Tax Act, because the principles prohibiting such prosecution in *Marchetti* are directly in point.

First, as we have demonstrated in our historical treatment of the Tax Act and the Import Act, the Marihuana Tax Act governs an area of activity permeated with criminal statutes and focuses upon individuals inherently suspect of

criminal violation. In the context of this criminal area, the information required would subject such individuals, inherently suspect of criminal violation, to real and appreciable hazards of self-incrimination under the state legislation.

Moreover, the Marihuana Tax Act includes various provisions expressly authorizing federal authorities to disclose such information to interested prosecuting authorities. The Secretary of the Treasury or his delegate is authorized under § 4754 to require registrants to submit statements and returns specifying the amounts of marihuana handled, and he is also authorized under § 4773 to "furnish . . . copies of any of the said statements or returns" to the "officials of any State or Territory, or of any organized municipality therein, or of the District of Columbia, or any insular possession of the United States, as shall be charged with the enforcement of any law or municipal ordinance regulating the production of marihuana or regulating the sale, prescribing, dispensing, dealing in, or distribution of narcotic drugs or marihuana."

Similarly, § 4775 authorizes the Secretary or his delegate to furnish "to any person, a certified copy of the names of any or all persons who may be listed . . . as special taxpayers," including importers, under § 4751.

Confronted with virtually identical disclosure, registration and tax provisions, and with an equally comprehensive authorization for federal disclosure to state and federal prosecuting authorities, the Supreme Court asserted:

> "In these circumstances, it can scarcely be denied that obligations to register and pay the occupational tax created for petitioner 'real and appreciable,' and not merely 'imaginary and unsubstantial,' hazards of self-incrimination" (390 U.S. 39, 48, 88 S. Ct. 702)—

and refused to save the federal statutes by applying use-restrictions:

> "The terms of the wagering tax system make quite plain that Congress intended information obtained as a consequence of registration and payment of the occupational tax to be provided to interested prosecuting authorities. . . . We must therefore assume that the imposition of use-restrictions would directly preclude effectuation of a significant element of Congress' purposes in adopting the wagering taxes. Moreover, the imposition of such restrictions would necessarily oblige state prosecuting authorities to establish in each case that their evidence was untainted by any connection with information obtained as a consequence of the wagering taxes" (390 U.S. 39, 58-59, 88 S. Ct. 708)—

but instead held that convictions under the Act were void as against individuals asserting the Fifth Amendment privilege.

It is manifest that individuals who cannot constitutionally be convicted under 26 U.S.C. § 5755, for their violations thereunder, also cannot constitutionally be convicted as tax violators under 21 U.S.C. § 176a, which does no more than assign an additional penalty for their same failure to comply. Section 176a governs the same criminal area, is focused upon the same individuals inherently suspect of criminal activity, and incorporates the same information, registration and tax requirements and the same disclosure authorization. Indeed, the legislative history shows that § 176a was enacted to supplement the same general federal systems of statutes designed to facilitate criminal prosecution. The constitutional infirmities of the tax and registration requirements do not evaporate when they operate through incorporation rather than express restatement.

Unless this Court is prepared to see the Fifth Amendment privilege—clearly applicable under the set of circumstances described above—swept away in a swirl of convoluted incorporation, convictions of tax violators under § 176a cannot stand consistently with *Marchetti*.

III. Notwithstanding the Validity of Any Parts of Title 19 of the U.S. Code, Customs Violators may Not be Convicted under 21 U.S.C. § 176a, for Failure to Disclose their Possession or Importation of Marihuana Consistently with the Principles of Marchetti and Grosso.

Before beginning discussion, it would be helpful to recapitulate the conceptual framework used in discussing the customs part of § 176a, under which "customs violators" might be prosecuted.

Customs violators are persons who bring marihuana into the country and do not fulfill one of the importation requirements of Title 19.

All of the Title 19 requirements applicable to marihuana are disclosure requirements.

All of the Title 19 requirements applicable to marihuana are not "invoicing" requirements, however, because some parts of Title 19 require disclosure through some means rather than "invoicing," such as oral declaration, etc. (*e.g.*, see 19 U.S.C. §§ 1304, 1484 and 1552).

Therefore all persons indicted under § 176a[2] for failure to invoice are customs violators.

However, all customs violators do not necessarily violate § 176a[2], since they may not have failed to invoice, but rather to declare in some other technical way. Therefore they would be indicted under § 176a[1] for importing "contrary to law."

Whether a customs violator has violated § 176a[1] and [2] by failure to invoice, or only violated § 176a[1] by failure to disclose his possession of marihuana in some other way, his offense is essentially the same: a refusal to disclose information concerning his activities with respect to or possession of marihuana.

So, when we refer to the customs part of § 176a, we shall refer to that part of § 176a which would be used to indict any person who refused to disclose such information, whether this disclosure was demanded by invoice or otherwise. Rather than speak of invoice requirements, then, we shall speak generally of customs disclosure requirements, which include, but are not limited to, invoicing requirements.

On initial scrutiny the customs parts of § 176a are on all fours with the National Firearms Act in relation to the Fifth Amendment. The disclosures whose refusal is punished under § 176a concern a limited class of goods intimately associated with illegal activity. (Perhaps the case against § 176a is even stronger than was the case against the National Firearms Act on this point. One can much more easily possess a machine gun and not commit a crime under state law than one can now possess marihuana and not commit a crime.) Also, the disclosures with which § 176a is concerned are required of a narrow class of persons inherently suspect of criminal activity in an area permeated by criminal statutes, as pointed out above in the section on the interworkings of the state and federal marihuana laws.

However, the Government might contend that there is a difference between the National Firearms Act and the customs parts of § 176a because an individual is not required to register by mere virtue of his possession, but only on the contingency of his entering the country. His alternatives are therefore not limited to simply a declaration of posses-

sion or else a violation of § 176a. He may choose to remain outside the country, and his choice to enter the country acts as a waiver of the Fifth Amendment; loss of the privilege is a condition of reentry.

The Court in *Marchetti* was not receptive to the various waiver arguments put forth there (see *Marchetti,* 390 U.S. 39, 49-51, 88 S. Ct. 704), and this argument is no more convincing. What sorts of conditions can be imposed on a citizen travelling abroad is not at issue here, except that waiver of the Fifth Amendment should not be one of the permissible conditions. Once a citizen is abroad, moreover, the theory of waiver on reentry is even less acceptable. The reasoning behind such a theory of waiver is faulty on two counts:

(1) The reentry here is an element of the crime; one cannot commit the crime without the reentry; but for the reentry there would be no crime under § 176a. The Government's argument here amounts to no more than its argument in *Marchetti* that the individual is free not to commit the crime. There the Supreme Court said that the Fifth Amendment did not concern the individual's right to commit the crime, but required that, once having chosen to do so, the individual cannot be made to incriminate himself. (See *Marchetti,* 390 U.S. 39, 51, 88 S. Ct. 704.) Therefore, under the Fifth Amendment the Government cannot rely on the fact that he chose to commit the crime to rob him of his Fifth Amendment privilege. It follows necessarily from this that the Government cannot rely on his having chosen to commit any given element of the crime. This again reduces the Fifth Amendment to the formula forbidden under *Marchetti*: refrain from the crime or incriminate yourself. This is unacceptable.

(2) The difference urged between the present case and *Marchetti* is an irrelevant distinction. Exclusion of a citizen from his country is as much a deprivation of funda-

mental liberty as imprisonment. It is as unconstitutional to condition the right of a citizen to return to his home upon a requirement of self-incrimination as it is to condition his right to remain out of prison on such a requirement. The argument of the Government on this point would simply give a person a choice between these two unacceptable limitations on his fundamental freedom. Acceptance of the Government argument would sustain the statute on the ground that the defendant had a choice in the particular way he was to be deprived of his liberty because of his refusal to incriminate himself.

In other words, exclusion from the country is punishment in this context. This type of exile or banishment has always been regarded as a very serious punishment. If this statute were to be sustained simply because the citizen who posesses marihuana could remain outside the country rather than disclose his possession, then the Government would be allowed to impose exile on all individuals who refuse to incriminate themselves under § 176a. As was pointed out by Professor John Mansfield in an article cited with approval by the Supreme Court in the *Marchetti* cases: "If the deprivation is so serious as to impair essential freedom, the case is practically indistinguishable from one where a person is required to report a crime simply because he committed it. The deprivation may be as serious as punishment for failure to report the crime." Mansfield, "The Albertson Case —Conflict Between the Privilege Against Self-Incrimination and the Government's Need for Information," 1966 Supreme Court Review 103, 139.

There is a second line of argument the Government might urge in order to save the customs parts of § 176a. This argument is somewhat more complicated and lengthy than the reentry argument just discussed. Therefore it will be convenient to set this argument out here in some detail for

purposes of discussion. The following presentation of this argument will be indented to avoid confusing it with the arguments or views of the Amicus.

The Government might argue along the following line:

> The customs parts of § 176a impose no new registration or disclosure requirements on importers of marihuana which did not exist prior to its enactment. In the case at bar we are considering whether petitioner has been required to incriminate himself in an improper way contrary to the Fifth Amendment. Since the customs registration requirements under Title 19 of the U.S. Code are proper requirements, under the principles of *Shapiro* v. *United States*, 335 U.S. 1, being requirements of a general statute not aimed at specifically self-incriminatory disclosures,[3] their restatement in and incorporation into § 176a does not, without more, render them improper. They are the requirements of a well-established exception to the Fifth Amendment. The hazard of self-incrimination imposed upon an individual is no greater by the passage of the customs parts of § 176a, and would be no less by their abolition. The individual would still be required by law to do exactly the same things he is now required to do under the general Title 19. Since the customs

[3] In citing *Shapiro* v. *United States* here and elsewhere in the brief, we do not thereby wish to indicate approval of the fact that *Shapiro* did not impose a use restriction on disclosures pursuant to a general statute. We believe that this is somewhat explained by the fact that the statute in *Shapiro* was an exercise of the war powers. We further believe that it would be a more proper interpretation of the Fifth Amendment under normal circumstances to impose a use restriction on incriminatory information elicited by the operation of even a general statute. However, we have cited *Shapiro* to show that our argument is valid *even if Shapiro* is accepted as the general standard.

parts of § 176a do not involve any imposition of improper hazards of self-incrimination, but merely restate those acceptable hazards of a general registration requirement, *Marchetti* v. *United States* and its companion cases do not apply.

The situation before us is much different from that in *Marchetti*. There the statutes in question did create new hazards of incrimination by their operation. The tests put forth there were promulgated to answer this question: If a statute creates a new hazard of self-incrimination, under what conditions is that statute's operation contrary to the Fifth Amendment? Creation of a hazard of self-incrimination is antecedent to the operation of the *Marchetti* doctrines.

If an individual may be required to comply with customs disclosure requirements, valid in themselves, then the Government may attach a more severe penalty for failure to comply with such requirements, since the operation of the greater penalty in no way increases the hazards of self-incrimination.

The petitioner urges that the above line of reasoning is constitutionally untenable for the following reasons: While 21 U.S.C. § 176a, incorporated certain criteria of illegality from Title 19, it is not Title 19 nor a part of Title 19. Section 176a was not conceived of by the Legislature as part of a general scheme to tax or account for incoming goods. It is a part of the comprehensive federal scheme to control marihuana. Section 176a is an archetypal specific statute. Standing by itself without Title 19, the Government could have little hope of saving it after *Marchetti*, because on its face it is entirely and totally aimed at a group inherently not simply suspect of, but usually guilty of, criminal

conduct in an area permeated with criminal statutes. The generality of Title 19, furthermore, cannot attach to § 176a because § 176a uses some isolated incorporations from Title 19. If we must tolerate the operation of Title 19 on self-incriminators in a limited number of cases, it is because the very generality of the language of Title 19 is necessary for its satisfactory operation. Also, the very generality of such a law is a built-in safeguard against it becoming a vehicle for the circumvention of the privilege against self-incrimination. Congress will not turn such a law into a means of harshly punishing criminals who refuse to incriminate themselves as long as many members of the non-criminal citizenry might also be affected by the general law's operation. However, if Congress is allowed to use the justification properly applicable only to such general laws to support other statutes aimed only at criminal areas, all of the built-in safeguards inherent in the natural division between "general" and "specific" disappear. Therefore, we need not and should not tolerate § 176a, and its operation upon a group with ample legitimate fears of self-incrimination simply because of the existence of Title 19. The Court in *Marchetti* was quite concerned with the erosion of the Fifth Amendment by what it termed "ingeniously drawn legislation" (*Marchetti,* 390 U.S. 39, 52, 88 S. Ct. 704). If this Court were to decide that such general legislation as Title 19 could be used to save such odious specific legislation as § 176a, it would put a formidable weapon in the hands of the ingenious draftsmen. Consider the following hypothetical:

> Hypothetical statute 1: All persons transporting goods in interstate commerce must register all such goods. Failure to register shall be punished by a fine of one penny or a sentence of one minute in prison, or both.

> Hypothetical statute 2: All persons transporting machine guns in interstate commerce contrary to law shall be punished by a sentence of five years in prison.

By this means the National Firearms Act could be raised from its grave.

At first glance the above hypothetical may seem somewhat frivolous. However, on closer examination one will find that it is an exact analogy of the Government's proposed use of Title 19 to save the customs parts of § 176a.

It must always be borne in mind that general statutes fall under an at best uneasily tolerated exception to the Fifth Amendment. Such statutes should be allowed only under circumstances where the necessity of a routine general registration outweighs the Fifth Amendment considerations which arise in a small percentage of cases under them, and the built-in safeguards of a truly general statute, as explained above, are present. This exception must be strictly limited in application. If the Government is allowed to validate otherwise unconstitutional legislation by placing a general statute behind it, there is a very real chance that the exception will devour the privilege.

If the Government's argument were accepted, then, any time Congress wished to focus on a group and impose disclosure requirements on them contrary to *Marchetti*, they would simply have to pass a general statute as a sop in order to dodge in under the wing of *Shapiro*, and then continue with their specific registration requirements as they had originally intended. Indeed, all that would be necessary to resurrect the National Firearms Act and the Gambling Tax Act would be such a toothless but formally valid general statute. The meaning of the *Marchetti* decisions would be very strange indeed. Instead of creating standards for judging if constitutional rights had been

violated, the *Marchetti* decisions would then simply have created the basis of a legal fiction of general intent, and would be sidestepped *pro forma* by Congress at will.

When a statute such as § 176a is drawn, it is removed from the general context in conception, in intention and in operation, and cannot rely on the close policy judgment sustaining the general statute to justify the narrowed statute, whose whole universe of application as narrowed is only those who have a legitimate fear of incriminating themselves if they do not divulge the information which the statute seeks to drag out of them.

The Fifth Amendment privilege should be "vital not formal" (*Marchetti*, 390 U.S. 39, 53, 88 S. Ct. 705, quoting *Gompers* v. *United States*, 233 U.S. 604, 610).

In order to avoid making the Fifth Amendment privilege an easily evaded formality, and to maintain it as a vital safeguard of individual liberty, this Court should reject the reasoning urged by the Government, and instead consider § 176a on its own merits apart from Title 19. In this form, the customs parts of § 176a, taken alone, are manifestly directed at securing the registration of a group of individuals inherently suspect of criminal activity in an area permeated with criminal statutes, and therefore the Fifth Amendment provides an absolute defense to prosecutions under the customs parts of § 176a.

This same conclusion is reached by thorough examination of the *Marchetti* cases. As we have pointed out above, any other conclusion renders the *Marchetti* decisions almost illusory in protecting the scope of the Fifth Amendment privilege against self-incrimination. We cannot believe that they mean so little. Throughout *Marchetti*, *Grosso* and *Haynes* there runs one underlying rationale: the Fifth Amendment privilege should be construed broadly and protected against subtle attempts at circumvention.

If the *Marchetti* decisions are not meaningless, or are not simply exercises in futile legalism, then their whole thrust must be taken as going towards a distinction between laws which are designed to operate generally and require a general form of disclosure as a necessity of taxation or economic control (where some self-incrimination is an unfortunate by-product in a limited number of cases), and laws where self-incrimination is the *raison d'être* or major focus of the law itself. The customs part of § 176a (in fact, all of § 176a) is definitely in the latter category.

The legislative history shows that § 176a was enacted in order to impose the same sort of registration requirements on those involved with marihuana as had already been imposed on machine-gun owners and gamblers. Section 176a has narrowed the scope of Title 19 and imposed a penalty on those falling into this narrowed scope far in excess of anything imposed on the general violator (five-year mandatory minimum; compare 18 U.S.C. § 545, the General Smuggling Act). Finally, Congress intended that special enforcement machinery and procedures would be developed to enforce § 176a, and this has in fact been the case.

Such differential enforcement and penalty, applied to such a narrow group, is conclusive evidence that § 176a was conceived as a method to punish severely a small group, with ample legitimate fears of self-incrimination, for their refusal to incriminate themselves under state law. The penalty of § 176a itself does not create a different requirement of incrimination from that created under Title 19, but it obviously seeks to single out a group with legitimate fears of incrimination and punish only them for their failure to incriminate themselves. In this way it seeks to make the class of probable self-incriminators change their judgment about the advisability of not incriminating themselves.

Inasmuch as § 176a and its penalty seeks to affect only a group of self-incriminators, and seeks by its operation to change their judgment and force them to incriminate themselves, it cannot be sustained.

The issue is not whether the marihuana is imported contrary to law, nor whether an individual may be prosecuted for failure to render it legal under a general statute. Presumably so long as Title 19 remains, undisclosed marihuana may be imported "contrary to law," and prosecutions may ensue under the General Smuggling Act.

Nor do we dispute that the Government may hike the penalties across the board regarding failure to comply with Title 19 requirements. However, the Government cannot single out the narrow group discussed above as it has done in § 176a, consistent with the *Marchetti* doctrines.

The point is that, notwithstanding the general customs requirements and notwithstanding the fact that the marihuana is imported contrary to law, the narrowed class of individuals subject to § 176a may not be prosecuted thereunder for such importation or possession, consonant with the principles of the *Marchetti* cases.

In other words, a marihuana importer may be prosecuted under the General Smuggling Act, where he is prosecuted as a member of a broad general group for failure to comply with general disclosure requirements. But, if the *Marchetti* decisions mean anything, he may not be prosecuted under § 176a, because under § 176a he is prosecuted as a member of a group inherently suspect of criminal activities in an area permeated by criminal statutes for failure to comply with requirements which, operating within the scope of this statute, serve no other function than to induce self-incrimination.

It remains only to be pointed out that the fact that there is no express statutory authorization for disclosure to state

authorities in relation to the customs parts of § 176a does not render convictions of customs violators more constitutionally acceptable. It is manifest that the customs parts of § 176a are integral parts of the same statutory scheme as the tax part of § 176a. The only distinction between them is that there are no provisions, comparable to 26 U.S.C. §§ 4773 and 4775, authorizing the Secretary of the Treasury or his delegate to furnish information as to custom disclosures. Nevertheless, here, as noted in *Grosso,* "neither has Congress imposed explicit restrictions upon the use of information obtained as a consequence" of such disclosure. 390 U.S. 62, 66, 88 S. Ct. 712.

In view of this language in *Grosso,* and in view of the actual practice of a cooperative exchange of information among state narcotic and federal customs and drug-law enforcement agencies, discussed *supra,* it is clear enough that the failure of the Marihuana Import Act to provide explicitly that the customs disclosures be turned over to state authorities does not diminish the threat to the nondiscloser's privilege against self-incrimination.

Furthermore, one cannot argue that, in view of the Congress's failure to provide explicitly for the distribution of the invoices, etc., to state authorities, this Court should hold merely that, as long as such invoices or the information contained therein are not turned over to state authorities, the invoicer's privilege against self-incrimination is not threatened. As the Supreme Court said in *Grosso,* 390 U.S. 62, 69, 88 S. Ct. 714:

> "Nonetheless, it would be inappropriate to impose such restrictions upon one portion of a statutory system, when we have concluded that it would be improper, for reasons discussed in *Marchetti,* to do so upon "an integral part" of the same system. We

therefore decline to impose the restrictions urged by the United States."

Thus *Marchetti* makes conviction of tax violators impossible under § 176a, while the *Grosso* extension similarly makes conviction of customs violators impossible, provided, of course, that in each case the defendant has properly raised his Fifth Amendment privilege, as has petitioner in the case at bar.

IV. Under the Rule in Haynes, Taken Alone, Importers Charged under § 176a[3] should be Afforded the Fifth Amendment Privilege as a Complete Defense; but Because an Attempt to Assert the Haynes Defense would Itself Necessitate Self-Incrimination under State Law, the Whole of § 176a[3] should be Held Unconstitutional.

One further section of the statute under which petitioner was indicted remains as a possible basis for conviction in the present case. Section 176a[3] expressly on its face imposes no duty to register marihuana, but simply makes it a crime to "receive, conceal, buy, sell, or in any manner facilitate the transportation, concealment, or sale of such marihuana after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . ."

This is a piece of legislation which this Court might very well term "ingeniously drawn legislation." *Marchetti* v. *United States*, 390 U.S. 39, 52, 88 S. Ct. 704. While appearing to make crimes only of various unrelated acts involving illegal marihuana, the clause so circumscribes the activities of a person with relation to marihuana illegally imported as to make any knowing possession or act of

ownership of such marihuana a crime.[4] Thus the effect of § 176a[3] is to create a basis of prosecution bottomed solely on possession of marihuana imported contrary to law.

As pointed out above, there are two classes of persons who might be charged under § 176a[3]. The first class comprises knowing possessors of illegally imported marihuana who did not themselves import the marihuana, and the second class is made up of knowing possessors of illegally imported marihuana who *themselves* brought the marihuana into the United States contrary to law.

The guilt of those in the first category rests on their receiving into their possession marihuana after its illegal importation by another. The Government might quite correctly make it a crime to receive and possess such illegally imported marihuana. This would only impose a duty on the individual to refrain from accepting into his possession any marihuana whose status under federal law was that of an illegal commodity. Section 176a[3] imposes upon these people no requirement that the individual at any time divulge his decision to break any law under penalty of criminal prosecution.

The second category, however, is comprised of people whose possession of marihuana is contrary to federal law only because they refused to incriminate themselves by complying with the tax and customs disclosure requirements. Had they done these things, their importation would have

[4] In fact, the only circumstances under which an individual, unauthorized by the state to possess marihuana, may possess it legally under § 176a[3] would occur if the marihuana were to fall, or to be shoved, into his hands or clothing without his assent. And then, since it is illegal to conceal, transfer or transport it, he would have to stand immobile, holding the marihuana in plain view forever.

been legal under federal law, and their possession would not be in violation of § 176a[3]. Thus the purpose of punishing *their* possession is specifically to punish their own failure to register.

The Supreme Court faced a problem identical to that presented by the people in group two; that is, importers of marihuana, in *Haynes* v. *United States, supra.* The United States tried to argue in *Haynes* that clause [3] of section 5851 of the National Firearms Act was based on possession of an unregistered firearm, and not on a failure to register. The United States may contend here, as it did in *Haynes*, that prosecution for possession was independent of any requirement of registration, and therefore no Fifth Amendment question was raised by prosecuting for the possession of the illegal commodity. To this the Court said:

> "We find this supposed distinction entirely unpersuasive, for, as we have found, the possession of a firearm and a failure to register are equally fundamental ingredients of both offenses. Second, it has been suggested that § 5841 creates a 'status of unlawful possession' which, if assumed by an individual, denies to him the protection of the constitutional privilege [citations omitted]. It has evidently been thought to follow that the privilege may be claimed in prosecutions under § 5841, but not those under § 5851. This is no less unpersuasive. For the reasons discussed in *Marchetti* v. *United States,* decided today [citation omitted], we decline to hold that the performance of an unlawful act, even if there exists a statutory condition that its commission constitutes a waiver of the constitutional privilege, suffices to deprive an accused of the privilege's protection. We hold that the petitioner's conviction under the registration clause of § 5851 is *not properly*

> *distinguishable* from a conviction under § 5841 for failure to register, and that *both offenses must be deemed subject to any constitutional deficiencies arising under the Fifth Amendment from the obligation to register.*" [Emphasis supplied.] *Haynes* v. *United States,* 390 U.S. 85, 95, 88 S. Ct. 729.

The Government might argue, however, that the situation here is clearly distinguishable from the one in *Haynes* because in *Haynes* the disclosure requirements upon which the possessory crime was based were themselves void under the Fifth Amendment; whereas here the customs disclosure requirements, upon which § 176a[3] relies for its basis of illegality, are presumably not constitutionally defective, at least as applied to the general class of people at whom they are aimed. In *Haynes,* the argument goes, an individual could not be prosecuted for the possessory offense because he could not constitutionally be required to perform the registration necessary to remove the illegality; whereas here, so long as Title 19 remains, the registration which is necessary to remove the illegality punished under § 176a[3] may be constitutionally required of defendants without abridging the Fifth Amendment privilege.

This argument, however, is merely a rephrasing of the one already met with respect to customs violators. The issue is not whether the disclosure requirements of some general statute can be constitutionally sustained as applied to the general population, but rather whether the disclosure requirements can be employed—be it by express reiteration or by reference—in a narrowly drawn statute designed to elicit self-incrimination of individuals from a class inherently suspect of criminal activity in an area permeated by criminal statutes. And we have already established in the

argument regarding customs violators that, while the customs regulations, as applied to the general class of people, may be constitutionally valid, they may not be narrowly employed under § 176a[1] or [2] as the basis of illegality relied upon to prosecute marihuana importers. The question then remains: May importers be prosecuted under § 176a[3] for possession of marihuana, imported contrary to law; when they could not be prosecuted under § 176a[1] or [2] for failing to render it legal?

Here, as in *Haynes,* when one is dealing with those who imported marihuana *themselves,* possession and failure to register are equally fundamental ingredients of the offense, because, *but for* an importer's possession, said importer would not be in violation of [3], and, *but for* an importer's refusal to register, invoice and pay tax, he would also not be in violation of [3], since the marihuana would have been imported contrary to law.

The holding in *Haynes* has broadened the scope of *Marchetti* and *Grosso* considerably. Not only may the Government not prosecute failure to disclose under a statute designed to elicit self-incrimination of those inherently suspect of criminal activities in an area permeated by criminal statutes; but moreover, if a person cannot be prosecuted under a statute, consistently with *Marchetti* and *Grosso,* for his failure to register, then likewise he may not be prosecuted for *possession* under a statute of similar scope and design, even though disclosure is not expressly required and even though the statutory machinery is cloaked in possessory terms.

The Fifth Amendment privilege extends to "both offenses"—to both the offense of not registering and the offense of possessing the thing which is illegal because the possessor refused to register. And this is the situation when an importer of marihuana is prosecuted on the basis

of § 176a[3]. The Fifth Amendment protection cannot be abrogated by making a status of possession the theory of prosecution rather than the failure to register.

Therefore importers who have themselves refused to pay the tax or meet customs disclosure requirements cannot be convicted under § 176a[3] for possession of illegally imported marihuana, since they could not have been prosecuted under § 176a[1] or [2] for their failure to comply with the customs requirements. This is not to say that importers of illegally imported general goods, as distinguished from marihuana, may not be prosecuted under a statute proscribing possession of such goods. We contend here only that prosecutions of marihuana importers under the possessory clause of § 176a—which, as applied to importers, is coterminal with § 176a[1] and [2] in scope of application and design to induce self-incrimination—are no more valid than prosecutions for failure to disclose under § 176a[1] and [2] themselves.

Nor should the fact that § 176a[3] by its language applies to all possessors of illegally imported marihuana, and therefore to some persons who were never required to disclose incriminatory information (transferees of illegally imported marihuana), work to deprive importers of the privilege against self-incrimination. Any possessory statute dealing with goods made illegal by non-registration can include both those who refused to register and their transferees under the term "possessor." The National Firearms Act provisions dealt with in *Haynes, supra,* could have been so interpreted. We submit that the inclusion of transferees in a possessory statute cannot thereby turn the statute into a general statute, or insulate its operation as to those actually required to disclose from the privilege against self-incrimination. If this were enough, all statutes seeking to elicit self-incrimination would be drawn in

possessory terms clearly to include transferees, and we would have but another formalistic rule of draftsmanship. Indeed, an amendment to the National Firearms Act to that effect would bring it back into operation, but the position of non-registrants under it would be the same. The protections afforded by the *Haynes* case would be wholly illusory. We do not believe the Court will sanction such an interpretation. Instead, the inclusion of transferees of non-registrants under a possessory statute should be irrelevant to the determination of the issues of self-incrimination thereunder, and the only question should be the effect of the disclosure requirements on those from whom disclosure is actually required by the operation of the statute. And, as we have shown, § 176a[3] violates the privilege against self-incrimination of all those required to disclose information by its operation—actual importers of marihuana.

What, then, should be done with clause [3] of § 176a? Some individuals chargeable under § 176a[3] are not importers, and their conviction is based on their reception of illegally imported marihuana rather than their refusal to register and incriminate themselves. They would seem to have no grounds to invoke the Fifth Amendment privilege, and no standing to object to proceedings against them under § 176a[3].

However, the survival of any part of § 176a[3] is not dependent on the position of these individuals, but rather on the position in which it places those who have a legitimate Fifth Amendment privilege under *Haynes*, as discussed above. If [3] is left operable as to any persons, then, in order to assert a claim of Fifth Amendment privilege, it would be necessary for a defendant to admit in open court that he himself was the initial importer of the marihuana in question, thus placing himself in a position of self-incrimination *vis-à-vis* state law. To prevent such a situation, either all-

defendants charged under § 176a[3] must be provided with a presumption at law that they were the initial importer, or else [3] is void as unconstitutional, since it in itself creates a necessity to incriminate oneself in order to assert the *Haynes* privilege against self-incrimination, which is available to the person who refused to register the marihuana initially. See *Jones* v. *United States, supra.* To allow the Government to create a situation in which either speaking or keeping silent violates a defendant's right against self-incrimination would put defendants on the horns of an intolerable dilemma. One might argue that a use-restriction on a defendant's admission of importation would solve the problems with [3], but such a solution is unavailable because of the reasoning in *Marchetti,* 390 U.S. 39, 59, 88 S. Ct. 708. Here, as there, the Congress intended information obtained as a consequence of registration and payment on the Marihuana Tax, and the disclosure requirements incorporated into § 176a[3], to be provided to interested prosecuting authorities. This has also, here as there, been the consistent practice. Therefore a significant portion of congressional purpose would be eliminated. Also, here as there, a use-restriction would endanger state prosecutions by forcing the state to rebut the presumption of taint in each case. Even if one were allowed to assert his importership in camera, dismissal of the charges would constitute strong evidence that one was an importer, and certainly alert state officials to be watchful of the defendant. Then, in a future prosecution, the state would be faced with the intolerable burden of proving that its evidence had not grown from the original federal indictment and dismissal, and the notoriety defendant gained as a result of the federal action would increase the likelihood of his prosecution by the state, even if federal charges were dismissed. Also, in any case in which the Government

wished to contest the importership of the defendant, the question would have to be brought to open hearing. By the reasoning of *Marchetti*, a use-restriction on a defendant's admission of importation is not available to save [3] of § 176a.

Thus the choice confronting this Court is one of creating a presumption of being an importer for all defendants charged under § 176a[3] or voiding [3] altogether as a violation of the Fifth Amendment. We submit that a court-created presumption of importership would be unwise because (1) it would change the scope of application of [3] so radically that there is no assurance that Congress would approve the clause in its judicially amended form, and (2) it would run contrary to the accompanying presumptive mandate of the Legislature that unexplained possession is enough to authorize conviction, since, with a presumption of importership, unexplained possession itself could only lead to acquittal under the Fifth Amendment privilege.

Congress might very well choose no convictions at all if given a choice between no convictions and convictions only of transferees, while actual importers would possess illegal marihuana with impunity. There would be a certain unfairness inherent in this situation which makes it very uncertain that Congress would have passed [3] in the form it would be in if the Court supplied a presumption of importership to save it. Given these facts, the Court would be undertaking a very grave form of judicial legislation if it supplied a judicially created presumption of importership. (This argument also applies equally to a use-restriction operating for importers only.)

In summary, the Court must *void* § 176a[3]. It does not suffice to provide a *Haynes*-type defense against conviction under § 176a[3]—as would suffice under § 176a[1] and [2]

—because, in attempting to assert his *Haynes*-defense against self-incrimination, a defendant would incriminate himself under state law.

V. The Use of Forced Disclosure Provisions in the Present Statutes Cannot be Justified by the Government's Greater Interest and Power in the Area of Border Control, because the Government can Adequately Effectuate its Interests by Prohibiting the Importation of Marihuana Entirely.

The Government might also argue that the *Marchetti* cases are distinguishable from the case at bar because in those decisions the Supreme Court was concerned with the taxing power of the Government, which, though considerable, does not amount to the power of absolute prohibition which the Federal Government can evoke against smugglers, in protection of its national borders. According to this argument, the power of the Federal Government to control its borders is essential to its regulation of foreign trade and protection of its citizens, and the border control power far exceeds the more limited tax power employed to effectuate national policing by facilitating state enforcement. Therefore, the argument would run, in a balancing between federal interests and the privilege against self-incrimination, the scales will tip in favor of the Government, since § 176a is reasonably directed toward the legitimate end of border control. Finally, because the Government might have prohibited the importation of marihuana entirely, an individual apprehended under such a prohibitionary statute would suffer the same increased hazard of subsequent state prosecution as under the present statute, since he would likewise be singled out as an individual suspect of criminal ac-

tivity. Therefore, an individual subject to the less-than-prohibitionary provisions of the tax-and-regulation scheme suffers no greater hazards than might be legitimately imposed under a statutory scheme prohibiting the importation of marihuana entirely.

This contention fails for a number of reasons. First, inasmuch as the Marihuana Import Act does *not* prohibit importation of marihuana entirely, but merely utilizes the disclosure requirements of the general customs provisions and the Marihuana Tax Act as a basis for punishing importers, the above argument assumes that the power to prohibit subsumes the power to compel disclosure. Obviously this is not true. A state may proscribe murder, but may not compel disclosure thereof. The balance between interests in regulation and enforcement, on the one hand, and the Fifth Amendment privilege, on the other, is a delicate one, and certainly is not irreversibly upset in favor of coerced disclosure merely because the Government might prohibit an activity about which disclosure is desired.

Petitioner contends, moreover, that the greater power of the Federal Government, with respect to border control, cuts the other way. The Gambling Tax Act and the National Firearms Act were not enacted so much to raise revenue as to prohibit possession of such items as shotguns. Registration and disclosure and reliance upon state prosecution are its chief weapons to effect a national prohibition of non-imported but taxable articles. To this extent there is some interest militating in favor of the Federal Government's power to elicit information and require registration. Indeed, until *Marchetti, Grosso* and *Haynes,* such interest was deemed sufficient to abridge countervailing Fifth Amendment protections. However, in the area of border control, where the Government *does* have the power to prohibit—where it need not have recourse to coerced disclosure to

effectuate its designs—there is not even as much federal interest as was involved in the *Marchetti, Grosso* and *Haynes* cases. With its power to prohibit and punish importation *per se,* the Federal Government need not, and should not, resort to the ill-advised techniques of forced disclosure, sustained by a vast bureaucracy dedicated solely to that end.

Finally, to say that the individual is subject to the same hazards of being singled out as suspect of criminal activity by prohibition is to disregard the fact that such hazard under a prohibitionary statute would not result from coerced self-incrimination. The concern here is not whether individuals might, under a more straightforward border control system, be frequently subject to state prosecution, but whether hazards of state prosecution result by design from coerced disclosure. In the area of border control, where the Government may prohibit importation to adequately effectuate its interests, there is all the more reason not to tolerate the indirections of forced disclosure; which inevitably and unnecessarily cut away at the Fifth Amendment privilege.[5]

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[5] This approach would also significantly clarify congressional intent. If Congress truly intended or intends to prohibit the importation of marihuana, it should do so directly. The convoluted and ambiguous disguises of taxation and import surveillance, in which it has thus far masked its intent, are both unnecessary and unbecoming. One cannot help feeling that, when legislation is devious, someone is trying to hide something unpopular or illegitimate within its dissembling. Thus the demise of § 176a, far from destroying federal power to regulate, may ultimately enhance federal power by eliciting a more direct law, which would in turn probably promote more respect and less cynicism from potential violators.

VI. THE PRESUMPTION IN 21 U.S.C. § 176a, IS VOID BECAUSE THE STANDARD OF "RATIONAL CONNECTION" BETWEEN THE FACT PROVED AND THE FACT PRESUMED IS INAPPROPRIATE TO IT, INASMUCH AS MOST INNOCENT DEFENDANTS CANNOT REASONABLY BE EXPECTED TO REBUT THE PRESUMPTION, AND NO EVIDENCE EXISTS WHICH WOULD SUSTAIN THE PRESUMPTION UNDER ANY MORE STRINGENT STANDARD OF CONSTITUTIONAL SCRUTINY.

21 U.S.C. § 176a, includes the following presumptive language:

> "Whenever on trial for a violation of this subsection, the defendant is shown to have or to have had the marihuana in his possession, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains his possession to the satisfaction of the jury."

The test generally used by this Court to determine the validity of statutorily created presumptions has been the following: Such a presumption would not be sustained if there was no "rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from the proof of the other is arbitrary because of lack of connection between the two in common experience. . . . [W]here the inference is so strained as not to have a reasonable relation to the circumstances of life as we know them, it is not competent for the legislature to create it as a rule governing the procedure of the courts." *Tot* v. *United States*, 319 U.S. 463, 467-468, 63 S. Ct. 1241, 1245. In the lower courts and in the briefs before this Court, petitioner has presented compelling proofs and arguments which militate for the conclusion that the bulk of marihuana found in the United States is of domestic origin, and that

therefore the presumption of importation in 21 U.S.C. § 176a, violates the traditional "rational connection" standard for presumptions, and should be struck down as a violation of due process of law. In these arguments and conclusions we totally concur.

However, we contend that, even if the Court cannot conclude that petitioner has proved that there is no "rational connection" between the bare existence of a quantity of marihuana and its having been imported, the presumption in § 176a still suffers constitutional infirmity because it is a very special kind of presumption to which the traditional "rational connection" test is inappropriate, and to which a much more stringent standard of constitutional judgment must be applied. There are four elements of a violation of § 176a necessitated by its own language: (1) The performance of a proscribed act *vis-à-vis* a quantity of marihuana; (2) the importation of the marihuana in question; (3) the fact that said importation was not lawful; (4) and the knowledge of the defendant that such marihuana was imported illegally. The language of the presumption in § 176a authorizes a jury to convict if only the first element of the crime is proved. Thus the presumptive language creates not one but three distinct presumptions: A presumption of importation; a presumption that said importation is illegal; and a presumption of knowledge.

The discussion which follows will concern itself only with the presumption of importation. As to the presumption of illegality, if a defendant could be expected to have evidence to rebut the presumption of importation, he would then have evidence of the method of importation and could rebut the presumption of illegality if he were innocent. As to the presumption of knowledge, the innocent defendant can rebut this by his own testimony. Thus these two are garden-variety presumptions to which we are willing to concede that the standard of "rational connection" is applicable.

The presumption of importation itself is a more exotic specimen, and, since it is antecedent to the operation of the other presumptions, the validity of the operation of the presumptive language as a whole must stand or fall with the presumption of importation.

Section 176a does not purport to make illegal by its terms activities with regard to domestic marihuana. The marihuana must be imported "contrary to law." *Therefore possessors of domestically produced marihuana are not guilty of a violation of § 176a.* Further, there are two kinds of possessors of domestic marihuana: those who know the origin of their marihuana because they or someone known to them grew and processed it; and those who possess marihuana which was in fact grown domestically, but who themselves do not know this fact, because they have obtained it from someone unknown by them, or only casually known, who has obtained it from someone else unknown by him, or only casually known, and so forth. Our attack on the presumption rests on certain assertions about the latter group, possessors of marihuana domestic in fact, but who have no knowledge of the origin of their marihuana.

It is only reasonable to assume that nearly all of the possessors of domestically grown marihuana do not know the origin of their marihuana. Marihuana does not come labelled; it is bought clandestinely; sellers are not eager to have their sources known, or even to have their own identities known. There are generally many intervening transactions between producer and ultimate consumer. Unless the Government is willing to claim that the majority of marihuana users "grow their own," then the majority of persons in this country who "conceal" (*i.e.*, possess privately) marihuana are merely consumers, who cannot reasonably be expected to have any evidence or even knowledge of the origin of the marihuana that they conceal (possess). But the presumption in § 176a authorizes conviction on

proof of the first element of the crime. *Most of those who have committed this first element of a violation of § 176a but who are not guilty of an actual violation of § 176a, because the marihuana they possess is of domestic origin, cannot reasonably be expected to have evidence or knowledge of the origin of their marihuana and cannot therefore rebut the presumption by any means, even their own testimony, even though they are innocent of a violation of § 176a.* Because the majority of even those who are innocent cannot be expected to rebut the presumption, the presumption works in such a way as to convict most innocent persons charged under § 176a, as well as the guilty. It has long been an underlying tradition of our law that it is better that one hundred guilty go free than that one innocent person be convicted. We submit that, when a presumption works so that even the innocent cannot reasonably be expected to rebut it, something more than a mere "rational connection" between the fact proved and the fact presumed is necessary to sustain the presumption as constitutional.

We submit that, where a presumption authorizes an inference about the status or condition of an object at a point in time perhaps far removed from the point in time at which the defendant acquired the object, and when the object itself provides no evidence of the prior state inferred (such as importation, in the present case) and when that inference is authorized by the bare possession of the object, then the relationship between the object and its previous status must be more than a mere "rational connection," because in no such case could any individual defendant be expected to provide rebutting evidence if he were innocent. We submit that under such circumstances there must not merely be a "rational connection" between the fact proved and the fact presumed, but there must be a nearly inevitable relation between the fact proved and the fact inferred. If the standard were any lower for this very special category of

presumptions, the Government would be able to convict unjustly almost half of all defendants charged under such a presumption. A "rational connection" is created when experience indicates that sixty cases out of one hundred, or even fifty-one cases out of one hundred, conform to the presumption. Under those circumstances, however, if the innocent charged under the statute cannot reasonably be expected to rebut the presumption, the presumption creates a potential of convicting such a high number of innocent persons that it violates notions of fundamental fairness.

A 51% correlation between the fact proved and the fact presumed would support the conclusion of a "rational connection"; the presumption would operate equally upon the 49% of defendants who were innocent and the 51% who were not, and the saving grace of most presumptions, the ability of the innocent person to rebut the presumption, would not exist in most if not all of the cases. Therefore, although, as in *Tot* and other cases, "a valid presumption may . . . be created upon a view of relation broader than that a jury might take in a specific case" (*Tot, supra,* at page 468), this view of relation should not be nearly as broad as a mere "rational connection" when rebuttal by the innocent cannot reasonably be expected, which is the case with the presumption in § 176a.

When most innocent defendants can reasonably be expected to rebut, the pressures to strike down the presumption and standard of connection between the element of the crime proved and the element presumed need not be as high in order to satisfy our notions of fundamental fairness and due process. A rational connection will suffice. But, when a presumption, as the presumption in § 176a, may operate against a large group of persons who, though innocent, cannot reasonably be expected to have or provide evidence rebutting the presumption, a more stringent standard than mere "rational connection" is necessary in order to satisfy

the due-process requirements of the Fifth Amendment. As we have said, a "rational connection" is merely anything which tends to establish that something is more likely than not. The rational-connection test applied to presumptions does not come near the protection afforded a defendant by the requirement of proof of an element of a crime beyond a reasonable doubt which the presumption replaces. Perhaps this is not so important when the defendant can be expected to have means to rebut if he is innocent. When a presumption is drawn in such a way as to apply to a large group who cannot be expected to have information to rebut the presumption even if they are innocent, however, the standard of connection between the fact proved and the fact presumed should and must more nearly approximate the surety and protection of proof beyond a reasonable doubt which the presumption has replaced.

With the possible exception of *Yee Hem* v. *United States*, 268 U.S. 178, 45 S. Ct. 470 (1925), this Court has never sustained a presumption in a criminal statute which shifted from the prosecution to the defense the burden of proof of an essential element of the crime, which burden the defendant in most instances could not reasonably be expected to be able to sustain if innocent. In every case the innocent defendant could either present his own perhaps convincing testimony to rebut the presumption,[6] or be expected to

[6] *Adams* v. *New York*, 192 U.S. 585, 24 S. Ct. 372 (1904), involved a presumption of knowledge which may be rebutted by *any* innocent defendant's own testimony. *Luria* v. *United States*, 231 U.S. 9, 25, 34 S. Ct. 10, 14 (1913), involved a presumption of non-intent to become a citizen, which may be rebutted by *any* innocent defendant's own testimony. *Hawes* v. *Georgia*, 258 U.S. 1, 42 S. Ct. 204 (1922), involved a presumption of knowledge which may be rebutted by *any* innocent defendant's own testimony. *Casey* v. *United States*, 276 U.S. 413, 48 S. Ct. 373 (1928), involved a presumption of purchase which may be rebutted by *any* innocent defendant's own testimony.

have access to some other effective means of rebuttal if innocent.[7]

Yee Hem concerned a presumption in a statute dealing with opium imported "contrary to law." The presumption was stated almost in the same words as the presumption in § 176a. Although the wording of the two presumptions is almost exactly the same, *Yee Hem* is distinguishable from the present case because the presumption sustained there operated in a different factual context from the one now before the Court.

The presumptive language in *Yee Hem* operated to create, not three, but four distinct presumptions: a presumption of importation; a presumption of illegality; a presumption of knowledge; and a presumption that all opium was imported after April 1, 1909. As to the presumption of illegality and the presumption of knowledge, we have no objection if the other two are sustained, as explained above.

As to the presumption of importation, there was no suggestion in the opinion, or in the briefs, of any significant possibility that opium found in this country had not been imported. Therefore, on the facts presented, the presumption was based upon something much more than a mere rational connection, something conceded by all parties to approach a near inevitability, and therefore much more closely approximating the safeguards of proof beyond a reasonable doubt on a presumed issue which even an innocent defendant could not be reasonably expected to rebut,

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[7] *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S. Ct. 337 (1911), a case involving a civil-penal statute including a presumption that pumping water from mineral wells on one's own property draws water from surrounding property. The presumption was based upon the science of geology, and *any* defendant has recourse to the science of geology to show that the land from which he pumped water did not conform to the presumption.

although the language is couched in terms of "rational connection."

As to the presumption of importation after April 1, 1909, the Court seemed to have been heavily impressed by the fact that fourteen years had passed between 1909 and the *Yee Hem* case. Whatever the infirmities of the presumption might have been when applied to defendants indicted under it at an earlier date, fourteen years seems to be enough time to say that the likelihood of someone not having consumed opium imported prior to 1909 in fourteen years was so low as to approach a clear inevitability, and to be something much more than a mere "rational connection," although the language is again couched in terms of "rational connection."

Thus *Yee Hem* may be distinguished from the present case because there was some indication on the facts of that case that the Court could have sustained the presumption there on a much more stringent standard than mere "rational connection," but chose that language because those were the accepted terms with which to speak of presumptions at the time.

However, even if this distinction does not prove persuasive, we think the presumption in § 176a should be struck down, and *Yee Hem* reversed if necessary.

If *Yee Hem* is read to apply the "rational connection" test to a presumption which a large number of innocent defendants cannot be expected to rebut, then it has no precedent in any case of this Court up to its decision and has not been reaffirmed by any case of this Court since. This in itself might not be such a strong objection to the case if there were any evidence in the *Yee Hem* opinion that the considerations we urge here were even considered by the Court.

It is clear from this opinion that the Court made no distinction between the presumption it faced in *Yee Hem* and a presumption where the innocent defendant *could* be expected to rebut.

The Court gives an example of what it considers to be an analogue to the presumption which it upheld: Possession of the effects of a murdered man may give rise to a presumption which must be rebutted. With all due respect to the Court, in such a case the accused has knowledge concerning whether or not he committed murder in question, and, if innocent, can at least honestly testify in rebuttal in every case. In the case at bar, neither the defendant nor anyone else likely has knowledge of the falsity of the fact presumed, so that even the innocent defendant probably has nothing, not even his own testimony, with which to rebut.

When a presumption works to destroy even this safeguard, it raises grave doubts on due-process grounds. We submit that the willingness of the Court in *Yee Hem* to make the analogy that it did, together with the rest of the language in that opinion, presents clear evidence that the Court in that case did not consciously consider the relevant questions involved in the presumptive language which it faced, and, unless this Court is willing to distinguish *Yee Hem* on its facts as outlined above, we would urge that *Yee Hem* be deemed not to control the case at bar, and if necessary be overruled.

In answer to all this reasoning, the Government might argue that the presumption is within the power of Congress because it simply works to create a duty to know the origin of any marihuana possessed, and thereby makes ignorant possession of marihuana possession at the possessor's peril. This was in part the reasoning used in *Yee Hem* v. *United States.*

If this interpretation of § 176a were accepted, every person would have a duty to ascertain the origin of any marihuana before acquiring it, and to secure proof of its origin which would be sufficient to rebut the presumption. Need we point out that we are now operating in the Never-never Land of legal fiction? Congress certainly did not expect anyone to be able to rebut the presumption, and in fact no defendant on record has to our knowledge successfully rebutted the presumption. The presumption is by intent and operation unrebuttable *de facto* because the probabilities of rebuttal by even the innocent are so low as to be little more than theoretical.

In creating a requirement of the knowledge of origin of all marihuana, we submit that Congress was acting outside its powers, using powers not properly ancillary to the border power or any other power. The effect of the presumption is to reach out to all marihuana, without regard to its importation, or effect on interstate commerce, or any other circumstance which might authorize the exercise of federal power, and create a means of federally prosecuting *any* possessor of *any* marihuana. The effect of the statute is not to reduce the flow of marihuana across the nation's borders, but to create a national contraband law, an exercise of the police power reserved to the states.

If the Government's rationale is accepted by this Court, the role of the Federal Government in legislating what substances shall be forbidden to the individual will become paramount, and there will be no room for the competing opinions which might prevail in the laboratory of the several states to manifest themselves, or for various approaches to the complicated problems of drugs, pornography, alcohol, tobacco, or any other substance which might suffer at some time an unpopularity which elicits the wrath of the Federal Government. As this nation's experience

with the prohibition of alcohol clearly indicates, these decisions are better left to the states, so that a popular hysteria which often arises concerning various substances and activities will less likely prevail on a national level.

We have attacked the presumption in § 176a as an invasion of the police powers of the states. We fervently believe this to be true. However, the Court need not find this in order to find that reading the presumption as creating a requirement of knowledge of origin will not save the presumption. Even if Congress might be deemed to have the power to pass a law making it unlawful to possess marihuana without being able to prove its origin, we submit that, although the language of the presumption operates in fact to do this, and while this operation in fact is a proper subject of judicial scrutiny in order to judge whether the law is an improper exercise of power, nevertheless presumptions should not be read as creating unarticulated substantive crimes in order to save them. While a presumption is void if it operates unconstitutionally, no matter how it was intended, a presumption should not be held valid if it does not operate constitutionally when read as a presumption, but might be constitutional as a substantive law, because the Legislature has simply not written the presumption as a substantive law. For the Court to sustain on this ground would be a form of judicial legislation. As was pointed out by Justice White in *United States* v. *Romano:*

> "According to the Government, however, the 1958 amendments were among other things, designed to overrule *Bozza* and must be viewed as broadening the substantive crime of possession to include all those present at a set-up still who have any connection with the illicit enterprise. So broadened, it is argued, the substantive crime of 'possessing,' under the teachings of

Gainey, could be acceptably proved by showing presence alone.

"We are not persuaded by this argument, primarily because the amendments did not change a word of § 5601(a) (1), which defines the substantive crime. Possession, custody, or control remains the crime which the Government must prove. The amendments, insofar as relevant here, simply added § 5601(b) (1) and permitted an inference of possession from the fact of presence. . . .

. . . . . .

"Congress may have intended by the 1958 amendments to avoid the *Bozza* case. But it chose to do so, not by changing the definition of the substantive crime, but by declaring presence to be sufficient evidence to prove the crime of possession beyond reasonable doubt. This approach obviously fails under the standards traditionally applied to such legislation. It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to so exercise this power. The crime remains possession, not presence, and, with all due deference to the judgment of Congress, the former may not constitutionally be inferred from the latter." *United States* v. *Romano*, 382 U.S. 136, 142-144, 86 S. Ct. 279, 283-284 (1965).

In the case before the Court the substantive crime remains possession or other acts in regard to marihuana "imported contrary to law," and *not possession of marihuana without proof of origin.* While the presumption may operate substantively and in fact in such a way as to be an unconstitutional exercise of Congressional power, the fact

that the operation of the presumption might be turned into an otherwise sustainable substantive crime cannot save the presumption if it operates unconstitutionally as drawn, that is, as a presumption. This is the case with the presumption in § 176a.

Conclusion.

For the foregoing reasons, the judgment of the United States Court of Appeals for the Fifth Circuit should be reversed.

Respectfully submitted,

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